APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1462

[Filed May 14, 2007]

Stephen B. Kunetsov, Appellant	)
	)
V.	)
	)
National City Bank of PA	)
	)

(Western District of Pennsylvania(Pittsburgh)
D.C .#06-cv-005 51)

Present: SCIRICA, Chief Judge SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

SUR PETITION FOR EN BA NC REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

circuit in regular active service not having voted for rehearing b the court en banc, the petition for rehearing is DENIED.

By the Court,
/s/ Thomas L. Ambro, Circuit Judge

Dated: May 14, 2007
CLW/cc: Raymond G. Hasley, Esq.
David J. Porter, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1462

[Filed May 14, 2007]

Stephen B. Kuznetsov, Appellant	)
	)
V.	)
	)
National City Bank of Pennsylvania	)
	)

(Western District of Pennsylvania
(Pittsburgh)D.C .#06-CV-005 51)

Present: BARRY, AMBRO, and FISHER, Circuit Judges

1. Affidavit of David J. Porter, Esq. in Support Motion for Sanctions.

/s/ Carmella L. Wells
Carmella L. Wells 267-299-4928
Case Manager

See DCO-80

ORDER

On April 18, 2007, we granted National City Bank of Philadelphia's ("the Bank") Motion to Dismiss and determined that the appeal by Stephen B. Kuznetsov was frivolous. Pursuant to Federal Rule of Appellate Procedure 38 we awarded the Bank sanctions in an amount up to $28,792.50 representing its claimed attorney fees. That award was contingent on the filing of an affidavit and exhibits demonstrating *bona fide*, lawsuit-related expenses. The Bank has now filed an affidavit and also requests an additional $7,113.00 for expenses incurred after the filing of its motion on March 5, 2007. Upon review of the Bank's submission, we find it to be essentially in order. We thus award $28,792.50 in attorney fees as sanctions, but deny the request for additional fees.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: May 14, 2007
CLW/cc: Raymond G. Hasley, Esq.
David J. Porter, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1462

[April 18, 2007]

Stephen B. Kunetsov, Appellant	)
	)
v.	)
	)
National City Bank of PA	)
	)

Western District of Pennsylvania
(Pittsburgh) D.C.
#06-cv-00551

March 19, 2007
DCO-80

Present: BARRY, AMBRO, and FISHER, Circuit Judges

1. Motion by Appellee, National City Bank of PA to Dismiss Appeal and for Sanctions.

2. Response by Appellant in Opposition.

3. Reply by Appellee to Appellant's Response in Opposition.

4. Letter dated 3/26/07 Construed as a Motion by Appellant to File Response to Appellee's Reply to Appellant's Response to Motion to Dismiss Appeal.

5. Response in Opposition by Appellee to Motion by Appellant to File Response to Appellee's Reply to Appellant's Response.

6. Supplemental response by Appellant in opposition to Appellee's motion to dismiss and for sanctions and Appellant's objection to Appellee's exhibit D

/s/
Carmella L. Wells 267-299-4928
Case Manager

ORDER

The foregoing Motion by Appellant to File Response to Appellee's Reply to Appellant's Response to Motion to Dismiss Appeal is DENIED. All subsequent filings are likewise rejected. The foregoing Motion by Appellee to Dismiss Appeal and for Sanctions is GRANTED. This case is dismissed for lack of jurisdiction. *See Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (explaining the holdings of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), together known as the *Rooker-Feldman* doctrine, to bar "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments"). Moreover, even if jurisdiction were proper, the underlying issue raised in this case (now inartfully recast as

a due process violation) was fully litigated in the Pennsylvania state courts and its resolution there plainly would be *res judicata* here. *See Allen v. McCurry,* 449 U.S. 90, 94 (1980). The Court, therefore, deems this appeal to be frivolous. *See also* Appellant's Resp. ¶¶ 1, 2, 13 (accusing Pennsylvania Superior Court judges of "lying and other misconduct" merely for rejecting Appellant's legal argument[1]). Pursuant to Federal Rule of Appellate Procedure 38, sanctions in an amount up to $28,792.50, as requested by the Appellee, will be awarded contingent on the Court's review of a sworn affidavit and supporting exhibits showing *bona fide,* lawsuit-related expenses. Such affidavit and exhibits are to be filed within 10 days of this order.

By the Court,

/s/Thomas L. Ambro, Circuit Judge

Dated: April 18, 2007
CLW/cc: Raymond G. Hasley, Esq.
Daivd J. Porter, Esq.

A True Copy

/s/
Marcia M. Waldron, Clerk

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[1] This is to say nothing of the ethical impropriety in advancing such an argument. It is decidedly out of bounds for lawyers practicing before our Court to transform disagreements over the law into bald allegations about a judge's integrity. *See* MODEL RULES OF PROF'L CONDUCT R. 8.2(a).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 06-551

[Filed January 16, 2007]

STEPHEN B. KUZNETSOV, Plaintiff,	)
-vs-	)
NATIONAL CITY BANK OF PENNSYLVANIA, a corporation, Defendant.	)

AMBROSE, Chief U. S. District Judge.

OPINION and ORDER OF COURT

SYNOPSIS

The parties have been involved in years of litigation relating to a Surety and Guaranty Agreement. Defendant seeks the dismissal of this action based upon both lack of subject matter jurisdiction and claim preclusion. I agree that neither the United States Constitution nor "national banking

laws" give me subject matter jurisdiction over what are essentially claims for breach of contract and breach of the duty of good faith and fair dealing. Additionally, I agree with the Defendant that even if I were able to exercise subject matter jurisdiction, Plaintiff's claims would be barred by the doctrine of res judicata. The Motion to Dismiss is granted.

OPINION

Plaintiff Stephen Kuznetsov ("Kuznetsov") was founder and chief executive officer of PSM Technologies, Inc. ("PSM"). In 1988, Kuznetsov and his wife agreed to serve as sureties and guarantors on a loan to PSM in the amount of $900,000.00 from Equibank, Defendant National City Bank of Pennsylvania's ("the Bank") predecessor-in-interest. Ultimately PSM defaulted on the loan and went into bankruptcy. During bankruptcy proceedings, the Bank sold its claim against PSM to Kovalchick Corporation and assigned its contractual rights under the Surety and Guaranty Agreement ("the Agreement") to Kovalchick. Kovalchick eventually confessed judgment against PSM on the promissory note and against Kuznetsov on the personal guaranty.

In 2001, Kuznetsov then filed suit in the Court of Common Pleas of Allegheny County, Pennsylvania against the Bank, Kovalchick Corporation and Joseph Kovalchick.[1] As against the Bank, Kuznetsov claimed that it had breached the Agreement and breached its duty of good faith and fair dealing by selling the PSM loan to Kovalchick instead of to him. The trial court eventually granted summary judgment in favor of the Bank.

---

[1] Kuznetsov eventually settled his claims with Kovalchick Corporation and Kovalchick.

Kuznetsov appealed to the Superior Court of Pennsylvania. Again, Kuznetsov argued on appeal that he had a "right to pay" as surety and that the Bank's refusal to allow him to repay constituted a material breach of the Agreement. The Superior Court rejected Kuznetsov's arguments and affirmed the grant of summary judgment. Undeterred, Kuznetsov filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied the Petition. Kuznetsov subsequently filed an Application for Reconsideration of Denial of Allowance of Appeal. The Pennsylvania Supreme Court denied this Application as well.

On April 26, 2006, Kuznetsov then initiated this action against the Bank. In the Complaint, though Kuznetsov does not reference the extensive litigation history between the parties, he does reference the Agreement. Specifically, he contends that the Agreement gave him the right to immediately repay the loan in the event that PSM defaulted. *See* Complaint, ¶ 4. According to Kuznetsov, when the Bank refused to permit Kuznetsov to repay the defaulted loan, it not only breached the Agreement but it breached the duty to act in good faith.

The Bank has filed a Motion to Dismiss and/or Motion for Summary Judgment. *See* Docket No. 3.[2] According to the

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[2] Though both parties have submitted numerous exhibits in conjunction with the pending Motion, I will still consider it a Motion to Dismiss. The exhibits consist of motions, briefs and opinions which were filed in the state court litigation and which constitute public records. In evaluating a motion to dismiss, I am permitted to consider public records. *See Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006), *citing*, Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* Section 1357 (3d ed. 2004).

Bank, this Court lacks subject matter jurisdiction over the matters raised in the Complaint. In the alternative, the Bank argues, Kuznetsov's claims are barred under the doctrine of res judicata. After careful consideration, and for the reasons set forth below, the Motion to Dismiss is granted.

STANDARD OF REVIEW

In deciding a Motion to Dismiss, all factual allegations, and all reasonable inferences therefrom, must be accepted as true and viewed in a light most favorable to the plaintiff. *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 666 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1988). I may dismiss a complaint only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In ruling on a motion for failure to state a claim, I must look to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide the defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666.

While a court will accept well-pleaded allegations as true for the purposes of the motion, it will not accept legal or unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27 n.2 (1977). Moreover, the plaintiff must set forth sufficient information to outline the elements of his claims or to permit inferences to be drawn that these elements exist. *See* Fed. R. Civ. P. 8(2)(a) and *Conley*, 355 U.S. at 45-46. Matters outside the pleadings should not be considered. This includes "any written or oral evidence in support of or opposition to the pleadings that provides some substantiation for and does not merely reiterate what is said in the pleadings." Charles A.

Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1366 (West 1990).

ANALYSIS

1. Subject Matter Jurisdiction

The Bank challenges the existence of subject matter jurisdiction over Kuznetsov's claims. "The plaintiff always bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction." *Doe v. Goldstein's Deli*, 82 Fed. Appx. 773, 775 (3d Cir. 2003), *citing*, *Gould Electronics, Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). In the Complaint, Kuznetsov alleges that "[j]urisdiction is based upon the U.S. Constitution and laws pertaining to national banks." *See* Complaint, ¶ 3. Nothing in the Complaint suggests the assertion of a constitutional claim. Nor does Kuznetsov invoke a "national banking law." Indeed, the claims asserted appear to be nothing more than for breach of contract and breach of the duty of good faith and fair dealing. Both claims are state law claims and would not support the exercise of federal jurisdiction.

In his Response in Opposition to Defendant's Motion to Dismiss and/or Motion for Summary Judgment (*See* Docket No. 15), Kuznetsov states that:

> This court has subject matter jurisdiction. The Bank is a national bank organized under federal law and subject to the jurisdiction of federal courts. 12 U.S.C.A. § 24 provides:
>
> > **Fourth**: to sue and be sued, complain and defend, in any court of law and equity, as fully

> as natural persons." [sic] as a national bank, Defendant is subject to state law, *See South Dakota v. National Bank of South Dakota*, 219 F. Supp. 842, affirmed 335 F.2d 444, *certiorari denied* 85 S. Ct. 667, 379 U.S. 970, 13 L. Ed. 2d 562.

See Docket No. 15, p. 3. I find Kuznetsov's reference to 12 U.S.C.A. § 24 to be unconvincing. Section 24 does not grant federal subject matter jurisdiction. Rather, it grants a bank the same *capacity* to sue and be sued as a natural person. Simply stated, Kuznetsov has not demonstrated that his Complaint gives rise to a claim arising under the Constitution, laws or treaties of the United States. Nor is there any indication that diversity jurisdiction would exist. As such, the Motion to Dismiss must be granted for lack of subject matter jurisdiction.

2. Res Judicata

Assuming, arguendo, that I could exercise subject matter jurisdiction, I turn to the Bank's argument regarding res judicata or claim preclusion. Generally, "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, (1980). To apply res judicata, a federal court looks to the preclusion law of the state in which the judgment was entered. *See Rose v. City of Allentown*, Civ. No. 5-5319, 2007 WL 30834 at *3 (3d Cir. Jan. 5, 2007), *citing*, *McNasby v. Crown Cork & Seal Co., Inc.*, 888 F.2d 270, 276 (3d Cir. 1989). The Third Circuit court recently observed that, in Pennsylvania:

> Res judicata bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

Rose, 2007 WL 30834 at *3, *quoting*, *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 669 A.2d 309, 313 (Pa. 1995). Having reviewed the voluminous records from the parties' state court proceedings, it is clear that Kuznetsov's claims raised in the federal complaint are barred by res judicata. Both the federal litigation and the state litigation involve Kuznetsov's alleged right under the Agreement to repay the outstanding loan; both suits involve the same parties; the state courts acted within their jurisdiction and the state court judgment was undoubtedly final. Indeed, Kuznetsov does not even dispute that these factors are satisfied.

Instead, Kuznetsov contends that the doctrine of res judicata is inapplicable because the state court judgment is somehow "void" given the Superior Court's violation of his due process rights. Specifically, Kuznetsov contends that the Superior Court violated his due process rights when it read his claim on appeal to be based solely on § 205 of the Restatement (Second) of Contracts, rather than as also encompassing the terms of the Agreement; when it construed the facts in favor of the Bank on the motion for summary judgment, when the Bank was the moving party; and when it misinterpreted and misapplied the relevant case law. In short, review of Kunetsov's submissions convinces me that, though he uses other phrases, his complaint here is nothing more than

that the Superior Court's decision is erroneous. As Kuznetsov himself acknowledges, however, a judgment is not void merely because it is erroneous. *See* Docket No. 20, p. 5 and citations set forth therein. Such an argument does not defeat application of the doctrine of res judicata.

ORDER OF COURT

THEREFORE, this **16th** day of January, 2007, for the reasons set forth in the accompanying Opinion, it is Ordered that the Defendant's Motion to Dismiss and/or Motion for Summary Judgment (Docket No. 3) is GRANTED. By way of further Order, the Defendant's Motion for Sanctions Pursuant to Rule 11 (Docket No. 21) is DENIED. Much of the Defendant's Brief in Support of Sanctions is devoted to Plaintiff's and his counsel's conduct before the Pennsylvania Courts. I decline to award sanctions for representations made to other courts. Certainly Plaintiff's and his counsel's failure to mention the history of prior litigation in the federal complaint and the vague reference to federal jurisdiction causes me some concern, but I am not convinced that such actions warrant the imposition of sanctions. It is further Ordered that Judgment is entered in favor of Defendant and against Plaintiff. This case is closed forthwith.

BY THE COURT:

/S/
Donetta W. Ambrose
Chief U. S. District Judge

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

CIVIL ACTION CASE NO. __

[Filed April 26, 2006]

STEPHEN B. KUZNETSOV Plaintiff,	)
vs.	)
NATIONAL CITY BANK OF PENNSYLVANIA, a corporation Defendant	)

TRIAL BY JURY DEMANDED

COMPLAINT

1. Stephen B. Kuznetsov is a citizen of Pennsylvania and resident of Allegheny County, and at all times material a customer of defendant Bank.

2. National City Bank of Pennsylvania (Bank) is a corporation organized and doing business in accordance with federal banking laws with headquarter offices in Pittsburgh.

3. Jurisdiction is based upon the U.S. Constitution and laws pertaining to national banks.

4. On or about July 25, 1988, Kuznetsov agreed to serve as surety and to guaranty the re-payment of a $900,000 loan made by Equibank to PSM Technologies, Inc. (PSM) and he executed a written contract submitted to him by the lender a copy of which is attached as Exhibit 1 and hereinafter referred to as the surety contract or agreement. The contract obligated him and gave him the right to immediately perform the obligations of PSM should it fail to make payments as required. The loan was secured by collateral owned by PSM appraised at about ten million dollars. The surety contract executed by Kuznetsov and Equibank's secured interest in the collateral were later acquired by defendant Bank.

5. Disputes arose between PSM and Kuznetsov which were compromised and settled in court proceedings with the settlement approved by the Court, Under the terms of the settlement Kuznetsov was to receive a payment from PSM equal to about 47% of all of PSM's assets and to secure payment to Kuznetsov PSM granted Kuznetsov a secured interest in all of the assets of PSM, including some of the same assets that secured repayment of the loan to the Bank and also secured Kuznetsov as surety. The Bank did not object to the arrangement.

6. In due course PSM failed to perform both its obligations to pay Kuzentsov and the Bank and Kuznetsov, to protect both his equitable and secured interests in PSM's assets, attempted to perform his contractual obligations as PSM's surety, that is, to pay the Bank the outstanding balance of approximately $400,000 due on PSM's loan. However, acting in bad faith, the Bank breached the terms of the surety contract, particularly paragraph number 1, and refused to permit

Kuznetsov to perform his contractual obligation to repay the loan in place of PSM.

7. In addition to the Bank's breach of the expressed and implied terms of the surety contract, and unknown to Kuznetsov at the time, the Bank participated in and/or cooperated in one or more secret deals or schemes with others to defeat Kuznetsov's interest in the assets of PSM and in addition, enabled an unjustified confessed judgment to be entered of record against Kuznetsov in the sum of about $540,000 for his alleged failure to repay the loan as required by paragraph 1 of the surety agreement.

8. As a consequence of the Bank's breech of contract and other misconduct Kuznetsov could not recover his court settlement with PSM, either in collateral or cash and sustained a loss of millions of dollars caused by the Bank.

WHEREFORE, Plaintiff requests judgment be entered against the Bank for compensatory and punitive damages.

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EXHIBIT 1 EXCERPT

In part, the Surety Agreement and Guaranty contract provided:

* * *

. . . the undersigned, and if more than one, each of them jointly and severally, hereby becomes surety for and irrevocably and unconditionally guaranties to Bank the full and punctual payment when due (whether on demand, at stated maturity, by acceleration, or otherwise and including any amounts which would become due but for the operation of an automatic stay under the federal bankruptcy code or any similar laws) of any and all present and future liabilities, indebtedness, and obligations of Borrower to Bank, however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, sole, with another, joint or several, due or to become due, secured or unsecured, contracted or acquired, written or oral, and whether as maker, drawer, endorser, guarantor, surety, or otherwise, whether rising in the ordinary course of business or otherwise, and any and all renewals, extensions, restatements, substitutions, modifications, consolidations, amendments, continuations, and the like of any of the foregoing, together with any and all interest (including, without limitation, interest which, but for the filing of a petition in bankruptcy by or against Borrower, would accrue on any of the foregoing), late charges, fees, costs, and expenses (including attorneys' fees and costs) arising from or relating to any of the foregoing or the collection or enforcement thereof (all of the

foregoing of which shall be referred to herein as the "Liabilities" and any of the foregoing as a "Liability."

1. If Borrower at any time fails to fully and punctually pay or perform any of the Liabilities when due the undersigned promises, jointly and severally, to pay and perform all such Liabilities immediately. (Emphasis supplied.)

* * *

APPENDIX F

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 134 WDA 2004

STEPHEN B. KUZNETSOV, Appellant	)
V	)
JOSEPH KOVALCHICK, KOVALCHICK CORPORATION AND NATIONAL CITY BANK, A CORPORATION OF PENNSYLVANIA, Appellees.	)

Appeal from the Order entered in the Court of Common Pleas of Allegheny County, Civil Division, No(s): GD 01-3277

BEFORE: FORD ELLIOTT, ORIE MELVIN and TAMILIA, JJ.

J. A03036705

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MEMORANDUM: FILED: May 19, 2005

EXCERPT FROM PAGE 14

. . . None of the authorities upon which appellant relies support his contrary position that he had a right to pay the debt.

In conducting our review, we have assessed the record in the light most favorable to Bank as the non-moving party. We find no abuse of discretion or error of law. (emphasis supplied)

Order affirmed.
Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: May 19, 2005

APPENDIX G

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 134 WDA 2004

STEPHEN B. KUZNETSOV, Appellant, v. JOSEPH KOVALCHICK, KOVALCHICK CORPORATION AND NATIONAL CITY BANK, A CORPORATION OF PENNSYLVANIA, Appellees.	)

Appeal from the Order of December 26, 2003 issued by Allegheny County Common Pleas Court Judge Alan S. Penkower in Civil Action No. GD 01-3277, Stephen B. Kuznetsov v. National City Bank of Pennsylvania

Excerpt at Pages 12 and 13 from
"Summary of the Argument"

Except for Creeger Judge Penkower cited no case law to support his reasoning and since receiving Judge Penkower's opinion, further research has identified case decisions right on point as far back as 1859 that support Kuznetsov's argument

that a surety has the right to pay the debt following the borrowers default:

* * *

> . . . the relation of principal and surety is one involving the utmost good faith and confidence; and it is the duty of the principal and the creditor to carefully consider and protect the rights of the surety, in all their transactions relating to the debt; . . .
>
> * * *
>
> A surety may, at any time, pay the debt to the creditor, and sue his principal at once, to reimburse himself. . .
>
> * * *
>
> A surety has always the right to pay the debt of the principal, and when he does so, he becomes entitled to be subrogated to all rights of the creditor. . .
>
> * * *

Willis v. Davis 3 Minn. 17; 1859 Minn.

Willis v. Davis has not been overruled or distinguished and has been cited a number of times in Minnesota and in other jurisdictions. And, in Pennsylvania, since 1879, the law has been to the same effect. See, Smith v. Harry 91 Pa. 119, 123 (1879):

> That decree established the executor's personal responsibility and it was his duty to make immediate

payment. It fixed the liability of his sureties for an absolute debt, a sum certain, for which there was then a present right of action against them; and they were not obligated to wait til after the legalese formally demanded the money, or issued process for its collection, before moving to protect themselves . . . and neither reason nor law required them to suffer the debt to become swollen by interest and costs, before they paid it, on pain of being treated as mere volunteers. . . . (Emphasis supplied.)

* * *

APPENDIX H

91 Pa. 119

Smith and. Kausler versus Harry.

H., who was an executor, gave to his sureties a mortgage to indemnify them against "all loss, cost, damage and expense which they could or might be put to by reason of their being securities on his bond." H. filed his account, showing a balance of $2000 in his hands. The court approved the account and ordered the fund to be distributed. H. at this time was insolvent, and one of the sureties advanced the money to pay the legacies. These payments were made before suit brought or before any demand was made upon the sureties by the legatees. The court below held that said mortgage was not an indemnity against mere liability, but against loss, cost, damage and expense, and that the mortgagees could not voluntarily and without demand upon them, convert their liability into loss, but only after proceedings *in invilum*. Held, that this was error; that the decree of the court approving the account, fixed the liability of the sureties for an absolute debt, a sum certain, for which there was then a present right of action; and that they were not obliged to wait until after the legatees formally demanded the money, or issued process for its collection, before moving to protect themselves; that the plaintiffs' rights as sureties were not waived by taking an indemnity such as this mortgage, and that they were entitled to all the advantage of said security.

June 19th 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY and STERRETT, JJ. WOODWARD, J., absent.

Error to the Court of Common Pleas, of *Franklin county*: Of May Term 1879, No. 216.

Arguments of counsel omitted

Scire facias sur mortgage issued by George W. Smith and John H. Kausler against J K. Harry.

Mr. Justice TRUNKEY delivered the opinion of the court, October 6th 1879.

The defendant concedes that the decree of the Orphans' Court approving the executor's account and making distribution, was all that was necessary as prerequisite to a suit on the bond. That decree established the executor's personal responsibility and it was his duty to make immediate payment. It fixed the liability of his sureties for an absolute debt, a sum certain, for which there was then a present right of action against them; and they were not obliged to wait till after the legatees formally demanded the money, or issued process for its collection, before moving to protect themselves. ["Harry had no means wherewith to pay the said distribution" and neither reason nor law required them to suffer the debt to become swollen by interest and costs, before they paid it, on pain of being treated as mere volunteers. Their liability had risen because of the principal debtor's default, and the law implies that he requested them to pay the money. Where a surety pays an overdue debt, he can recover what he pays from the principal debtor, who will be

considered as having requested him to pay the debt in receiving him as his surety: 1 Par. Con. 893.

In equity, as soon as the surety pays the debt, he is considered as subrogated to all the remedies of the creditor against the person and estate of the principal. In some cases, without payment, a surety, apprehending danger from the delay of the creditor, may compel him to sue the principal debtor on giving an indemnity against the consequences of risk and expense. A surety may file a bill in equity against the principal to compel him to pay the debt at maturity, and make the creditor a party in order that he be at hand to receive the money. In an early case it was said: "Although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable, the court will decree the principal to discharge it, it being unreasonable that a man should always have such a cloud hanging over him:" Renelaugh *v.* Hays, 1 Vern. 188; 1 Story's Eq., sect. 327; 1 L. C. Eq. 144; 3 Id. 557; Hays *v.* Ward, 4 Johns. Ch. 128; Beaver *v.* Beaver, 11 Harris 169.

When the executor made default in payment to the legatees, according to the decree of the Orphans' Court, well settled principles authorized his sureties at once to commence proceedings to compel him to pay the debt, or themselves could pay it, as they did, and recover the money from him. The mortgage contains no express or implied contract depriving the mortgagees, as sureties, of any remedies against the mortgagor, as principal. Both on its face and in its circumstances it was a security to the sureties against "all loss, cost, damage and expense which they could or might be put to by reason of their being sureties on said bond." Upon the executor's default in complying with the said decree, they could have been put to damage and expense; they were legally bound to pay the debt, and had a right to discharge it and

avail themselves of the security. The mortgagor has no color of defense. Was not that recorded mortgage notice to a subsequent purchaser or creditor? He could see that the land was pledged to save harmless the sureties on an executor's bond fully recited in the mortgage. He is presumed to have known the extent of their liability, and that, upon the executor's default, it would become the sureties' duty to pay the money according to the adjudication of the Orphans' Court. The facts show no superior equity in favor of a subsequent creditor.

This case differs widely from Crippen *v.* Thompson and Bishop, 6 Barb. 532, cited by the below. There the action was on a bond, given to Crippen by Thompson as principal and Bishop as surety; conditioned that Thompson should "save harmless the said" Crippen "from a bond executed by him to Nathan R. Crippen, deceased, dated on or about the 3d day of March 1840, the said Crippen giving the said Thompson notice of any proceedings at law or otherwise thereon." That bond was to pay the debts of' Crippen, Sr., the plaintiff's father. After it was given and before the defendants gave their bond, the plaintiff agreed with Dayton to pay him a debt owing by the father, making himself directly liable for it and thereby precluding all examination and defense as to that debt. The court, in the opinion, said: "The question in this case, as we shall see, is whether the plaintiff can pay the debt of his father, voluntarily and without notice and then recover upon the bond, against him and his surety?" It was held he could not. Here the mortgagor was the principal debtor, had his day in court, with opportunity to test the legality of the claim ; and after final decree and his default, his sureties, the mortgagees, actually paid the debt, before commencing proceedings on the mortgage. The doctrine in Crippen *v.* Thompson, if sound, does not apply.

The plaintiffs had rights as sureties which were not waived by taking an indemnity against "loss, cost, damage and expense," and having suffered loss, by reason of their suretyship, are entitled to advantage of their security.

Judgment reversed and a new trial ordered.